Filed 11/3/10 In re A.N. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.N., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.N., Defendant and Appellant.	F058688 (Super. Ct. No. 09CEJ600406-1) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos Martinez and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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A.N. appeals from a judgment of the juvenile court finding that he came under the provisions of Welfare and Institutions Code section 602. The court found true allegations that he committed three counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)),[1] personally used a firearm (§ 12022.5, subd. (a)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)). A.N. contends no substantial identification evidence supported the finding that he was the individual who shot the victims. He further contends defense counsel rendered ineffective assistance by undermining A.N.'s new trial motion by failing to pursue it and by referring to newly discovered evidence as double hearsay. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On Saturday, May 23, 2009, at approximately 10:00 p.m., Ernesto Hernandez and his wife, Deborah Hernandez, were sitting with their friend, Viviana Garcia, in front of their house. They saw a shadow on the sidewalk behind their car, which was parked in their driveway, and a figure dressed in dark clothing and a black hat suddenly fired two shots from a shotgun at them. All three were injured: Deborah[2] was hit in the legs, Ernesto was hit in the arm, legs and stomach, and Viviana was hit in the hands. They were rushed to the hospital and underwent surgery. Two days later, Deborah called the police and identified the shooter as 14-year-old A.N., a neighbor who lived down the street from her. She identified him again in a photo lineup. Viviana identified a different person in the photo lineup as the shooter; Ernesto apparently did not identify anyone. A.N. was arrested and questioned. He denied being involved in the shooting, first stating he was at a friend's house that evening, and later stating he was at home at the time of the

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 Because some of the individuals involved share last names, we refer to the participants by their first names for clarity and convenience. No disrespect is intended.

shooting. At the jurisdictional hearing, members of A.N.'s family and a family friend testified they saw A.N. in his own house within minutes after they heard the shots.

There was testimony that the relationship between Ernesto's family and A.N.'s mother, E.R. (hereafter Mother or E.R.), and her family was not good. Ernesto's cousin, Nathan, had attacked Mother and injured her nose; he spent time in prison for it. On the night of the shooting, Nathan and his cousin, Omar, visited Ernesto, but they left around 8:00 p.m., before the shooting. According to Mother, earlier on the day of the shooting, Omar and Nathan passed by her; they said something and she probably said something back. A.N. was present when this occurred.

A.N. was charged with three counts of attempted murder (§§ 664, 187, subd. (a)), three counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of shooting at an inhabited dwelling (§ 246). The court found the allegations of assault with a firearm on the three victims true; it found the other counts were not proven beyond a reasonable doubt. It adjudged A.N. a ward of the court and committed him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice for a maximum of 17 years (four years for the first assault count, plus three years for the great bodily injury enhancement and 10 years for the firearm enhancement, with the other counts to run concurrently).

DISCUSSION

I. Sufficiency of the Evidence

A.N. challenges the sufficiency of the evidence to support the court's decision; in particular, he challenges the sufficiency of the identification evidence to prove that it was A.N. who shot the three victims.

When we apply the substantial evidence standard of review, we review the entire record in the light most favorable to the prosecution to determine whether there is substantial evidence — i.e., evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could have found the essential elements of the alleged

crimes beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*); *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1080 (*Brandon G.*).) The test is not whether guilt is established beyond a reasonable doubt. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808 (*Roderick P.*).) We must presume in support of the judgment the existence of every fact the trier of fact reasonably could have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 (*Boyer*).) "[I]f the circumstances reasonably justify the trier of fact's findings as to each element of the charged offense, we must affirm even if the circumstances and evidence would support a contrary finding." (*Brandon G., supra,* at pp. 1079-1080.) Issues of witness credibility are for the trier of fact. (*Boyer, supra,* at p. 480.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Zamudio, supra,* at p. 357.) The same principles of appellate review that apply in reviewing a criminal conviction apply in reviewing the sufficiency of the evidence to support a finding in a juvenile proceeding that the minor violated a criminal statute. (*Roderick P., supra,* at p. 809.)

Regarding the identity of the person who shot him, Ernesto testified he saw a "kid in a black shirt with a black hat sideways." He did not see the person's face and could not tell if the person was male or female; the person was small and skinny and, from the shape and the way the gun was held, looked young. Vivian testified it was too dark to see the person with the gun.

Deborah initially testified the shooter was wearing a black shirt, black hat, and blue pants, and she was unable to see his face. Later, she stated the light flashed in his face and she was able to see it, for less than a second. When Officer Chris Martinez brought the photo lineup to the hospital and asked her to identify the person who shot her, she picked out A.N.'s photograph. She identified him because she recognized him as the person who fired the gun. She knew him from seeing him around the neighborhood. She

did not identify A.N. on the night of the shooting because she was in pain and no one asked her to identify the shooter while she was at the house. A deputy sheriff came to talk to her at the hospital that night, but she was already under anesthesia; she told him it was a kid with a black shirt, but she was drowsy and could not explain more.

Officer Robert McGuire testified he was dispatched to the Hernandez house in response to a report from a woman that she and two others had been shot. When he arrived, he asked Deborah who did it; she was not really able to speak, but she said "[E.R.]'s kid" did it. Officer McGuire did not know who E.R. was or where she lived. When he asked Deborah to explain, she was moving back and forth, moaning in pain, and did not respond. He did not include the information about "[E.R.]'s kid" in his report and did not send an officer to E.R.'s house to talk to anyone.

Two days after the shooting, Deborah telephoned Officer Martinez and told him that A.N., who lived down the street, was the person who shot her. Officer Martinez prepared a photo lineup that included A.N.'s picture; Deborah identified A.N. as the person who fired the shotgun.

The trial court rejected A.N.'s alibi evidence because of its inconsistencies. Mother testified she was outside in front of her house with Romero Moreno, her parents and some neighbors when she heard a loud bang; she looked down the street but could see nothing. She went inside and saw A.N. coming down the hallway.

A.N.'s grandfather, A.R. Sr. (hereafter Grandfather or A.R. Sr.), testified he was barbecuing in the front yard with his wife, a neighbor, and Moreno when he heard shots. No one came out or went in the front door after they heard the shots, except his son, A.R. Jr., who came out to ask if they had heard the shots. A.N. tried to come out a minute after the shots, but Grandfather stopped him and told him to wait inside. Grandfather testified that Mother was with the neighbors across the street at the time of the shooting. Moreno also testified only grandparents, Moreno and a neighbor were in the front yard when the shots were fired.

A.R. Jr. testified he lived in the same residence with A.N. and was in his room when he heard two shots. He rushed out of his room to talk to his brother and passed A.N. coming out of the bathroom. A.R. Jr. went outside and asked his parents if they had heard the shots. His mother and father, a neighbor and Moreno were in the front yard. Approximately midnight, A.R. Jr. spoke to Officer Adolfo Jimenez, who was going door-to-door talking to the neighbors. He told the officer he was in his room when he heard two shots.

Moreno testified he went to A.N.'s house to visit with a former coworker. Moreno heard shots while he was in the front yard. About two minutes after the shots were fired he went inside and saw A.N. in the hallway.

Officer Jimenez testified A.R. — he did not specify whether it was A.R. Sr. or A.R. Jr. — reported he was standing in front of the front door of the house when he heard the shots.

A.N. argues that substantial evidence does not support the identification of him as the person who fired the shotgun. He asserts the identification evidence was inherently improbable and the alibi evidence could not reasonably have been rejected. "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Huston* (1943) 21 Cal.2d 690, 693 (*Huston*), disapproved on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352.)

A.N. asserts he was identified by only one of the victims, who only saw the person who shot her for less than a second, and whose perception and recollection may have been impaired by the sudden violence and physical trauma. He points out that Officer McGuire did not include Deborah's identification of "[E.R.]'s kid" in his report even though, he contends, it "surely should have featured prominently in his report."

Although Deborah's testimony was not a model of clarity, she did testify that she saw the face of the person who shot her and recognized him as A.N. She stated she was not questioned at the scene. That night at the hospital, she only briefly spoke to an officer because she had already been given an anesthetic. She was injured Saturday night and underwent surgery; she called from the hospital and reported the identity of the shooter Monday morning. Officer McGuire recalled asking Deborah at the scene who did it, and Deborah identified "[E.R.]'s kid." The exchange took only a few seconds. Deborah's failure to remember the exchange may be attributed to her condition at the time. Officer McGuire observed she was moving back and forth and moaning in pain. Officer McGuire was not asked to explain the omission of Deborah's statement from his report, so the reason for it is not known. While the evidence may have been "subject to justifiable suspicion" (*Huston, supra*, 21 Cal.2d at p. 693), it was not inherently improbable.

A.N. also asserts the purported inconsistencies in the alibi evidence were actually "misunderstandings of the evidence." He suggests the main purported inconsistency was that between A.R. Jr.'s testimony that he was in his room at the time the shots were fired and Officer Jimenez's testimony that A.R. Jr. said he was in the front yard when the shots were fired. A.N. maintains this was actually a misunderstanding about which A.R. Officer Jimenez interviewed. A.N. suggests the information given to Officer Jimenez was consistent with A.R. Sr.'s testimony that he was standing in the front yard near the front door when he heard the shots. It was A.R. Jr., however, who testified Officer Jimenez interviewed him; there was no evidence Officer Jimenez interviewed A.R. Sr. In

rebuttal, after Officer Jimenez testified, the defense recalled A.R. Jr. who stated he told Officer Jimenez he was in his room when he heard the shots. The defense did not recall A.R. Sr., and A.R. Sr. did not testify that Officer Jimenez interviewed him, or that it was he who told Officer Jimenez he was standing by the front door when the shots were fired.

There were other inconsistencies in the alibi evidence. Mother testified she was in the front yard when she heard the shots, and she went inside two minutes later. A.R. Sr., Moreno, and A.R. Jr. all indicated she was not in the front yard at that time. Mother's and Moreno's testimony that they went inside just after the shooting was contradicted by A.R. Sr., who stated no one except A.R. Jr. went in or out after the shooting. We conclude the trial court's rejection of the alibi evidence was properly based on its weighing of the evidence and the credibility of the witnesses.

On appeal, we do not reweigh the evidence or revisit credibility issues. (*People v. Pham* (2009) 180 Cal.App.4th 919, 924-925.) Any inconsistency in the evidence goes only to the weight and credibility of the evidence; we will not disturb the trier of fact's resolution of that inconsistency. (*People v. Tompkins* (2010) 185 Cal.App.4th 1253, 1261.) Identification of the accused by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. (*Boyer, supra,* 38 Cal.4th at p. 480.)

We do not find the identification evidence to be inherently improbable or unbelievable. "'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]'" (*Zamudio, supra,* 43 Cal.4th at p. 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Ibid*.) We find there was substantial evidence to support the court's determination that A.N. was the person who fired the shotgun that injured the three victims.

II. Ineffective Assistance of Counsel

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has a right to the effective assistance of counsel; that is, he has a right to "'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*In re Gay* (1998) 19 Cal.4th 771, 789-790.) This right extends to minors in juvenile delinquency proceedings. (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857.)

A claim of ineffective assistance has two components: the defendant bears the burden of demonstrating (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the deficiencies resulted in prejudice. (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746 (*Ledesma*).) "Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*Id.* at p. 746.) If the record does not reflect the reason for counsel's actions or omissions, the claim would be more appropriately addressed in a habeas corpus proceeding. (*Ibid.*)

On August 16, 2009, at A.N.'s disposition hearing, his attorney indicated to the court that he wished to make a motion for a new trial; he stated he had received some information that might lead to newly discovered evidence. He asked for and obtained a continuance to investigate and file a written motion. When the prosecutor asked for clarification, A.N.'s attorney explained that he was not then making a formal motion for new trial because he did not have the supporting evidence to do so; rather, he was

requesting time to follow up on information he had received, which suggested there might be new evidence to be discovered.

Defense counsel did not file a written new trial motion. On October 5, 2009, at the continued disposition hearing, the defense submitted letters, including one from Orlando Prado. Prado stated that he was in front of his house on May 23, 2009, and saw his neighbor, Ernesto, with two of Ernesto's friends, Nathan and Omar. Nathan and Omar started arguing and pushing each other and Ernesto got between them. Prado told his family to go inside before things escalated. About 10 minutes later, Prado heard two gun shots. He expressed his opinion that A.N. did not commit the offense, but was accused by Ernesto and Deborah because they dislike A.N.'s mother. Another letter, from Veronica Bell, stated that her godmother worked in the same dental office as Deborah, and Deborah told the godmother that she knew A.N. did not do it and it was too dark to tell who did. A.R. Sr. spoke at the hearing and asserted he had telephone records showing that A.N. was making a telephone call from his house at the time of the incident. After A.N.'s family members spoke, his counsel represented that he had investigated in an attempt to discover new evidence, but "double hearsay was as close as I was able to get." He then argued for leniency, based on A.N.'s age and supporting letters indicating A.N. was "not a bad kid."

A.N. contends his attorney rendered ineffective assistance because he first made an oral motion for new trial, then undermined it at a subsequent hearing by referring to the new information that might have supported the motion as double hearsay. He contends counsel should have either made and fully supported the motion, or not made a motion at all. He asserts counsel's action afforded A.N. no tactical benefit.

Defense counsel did not make a motion for new trial. He indicated an intention to file a new trial motion and requested a continuance to investigate whether there were grounds for such a motion; he subsequently declined to file such a motion because he found no new evidence to support it, except double hearsay. Thus, he did what A.N.

contends he should have done: he refrained from making a new trial motion that he thought was unwarranted. Counsel did not make, and then undermine, his own motion.

A.N. asserts Prado's observations of the activities of Ernesto, Nathan, and Omar were not hearsay. Defense counsel was not asked, and did not attempt to explain, why he rejected Prado's observations as evidence to support a new trial motion. This is not a situation in which "'there simply could be no satisfactory explanation'" for counsel's decision. (*Ledesma, supra*, 39 Cal.4th at p. 746.) Prado may have recanted his statements; his family may have denied that the events took place as he stated. Prado's statements provided only weak evidence, if any, of the identity of the person who shot the three victims. A.N. seems to contend Nathan or Omar may have shot Ernesto and his companions as a result of the dispute 10 minutes before the shooting. According to Prado, however, Nathan and Omar were fighting with each other, not with Ernesto.

The record reflects only a limited explanation of the attorney's decision not to file a new trial motion. That explanation indicates the attorney investigated the information claimed to support a motion for new trial and based his decision not to bring such a motion on his evaluation of the potential evidence. A.N. has not met his burden of demonstrating that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Thus, he has not established that his attorney rendered ineffective assistance to him.

DISPOSITION

The judgment is affirmed.

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HILL, J.

WE CONCUR:

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CORNELL, Acting P.J.

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DAWSON, J.